Filed 3/10/09 In re D.H. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.H., a Person Coming Under the Juvenile Court Law.	B210526 (Los Angeles County Super. Ct. No. CK57555)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RYAN B. et al., Defendants and Appellants.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Jan G. Levine, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant Ryan B.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant C.H.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ryan B. appeals the juvenile court's denial of his petition under Welfare and Institutions Code[1] section 388, in which he requested reunification services with his son D.H. C.H., D.H.'s mother, appeals the order terminating her parental rights under section 366.26. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

D.H., 22 months old, was detained by the Department of Children and Family Services (DCFS) in November 2007 due to his parents' use of drugs and their maintenance of an unsanitary home with drug paraphernalia and drugs left within his reach. C.H. was arrested on November 2, 2007 for obtaining credit with another person's identification (Pen. Code, § 530.5, subd. (a)). Ryan B. was arrested on November 7 for unlawful possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

On November 7, 2007, DCFS filed a dependency petition alleging that D.H. fell within the jurisdiction of the juvenile court under section 300, subdivision (b) (failure to protect). After a contested adjudication hearing, the juvenile court sustained the allegations of the dependency petition. The court ordered no reunification services for C.H. pursuant to section 361.5, subdivisions (b)(10) and (b)(11) because the termination of reunification services and the termination of parental rights had been ordered with respect to D.H.'s half-siblings, C.H.'s other children.

The court ordered no reunification services for Ryan B. pursuant to section 361.5, subdivision (e)(1). The juvenile court found "by clear and convincing evidence reasonable services to reunify him with his child would be detrimental. [¶] He is not going to be released in any event before his six-month hearing. And there's no probability under those circumstances that even if he were able to be clean and sober, he would be in a position to show that there was a substantial probability for him to have the child returned to him. He won't be able to visit with the child. And he won't be able to

[1] All statutory references are to the Welfare and Institutions Code.

complete the objectives of any treatment plan. [¶] I find that the judgment displayed in this series of incidents of having a two-year old in a motel room wandering through drug paraphernalia, snakes, exposed wires, filth, would ca[u]se you to have a great deal of education about parenting and to sort of consider how you got yourself into that situation with a two-year old. And I just don't see that you can complete your prison sentence and do all that in the time the law gives you. [¶] I will find that it would be detrimental to offer you services. . . . [I]f you are able to do services in your place of incarceration, you can file a petition to change my order and seek services at a later time."

On January 18, 2008, D.H. was placed in the home of his great-aunt and great-uncle, the prospective adoptive parents who had previously adopted D.H.'s half-siblings. D.H. adapted well to the placement, and the updated home study revealed no impediments to the adoption. D.H. called his prospective adoptive parents "Mom" and "Dad." DCFS reported that the prospective adoptive parents provided D.H. with a safe and structured home environment; met his physical, emotional, and educational needs; and complied with the DCFS plan. DCFS observed that D.H. appeared to be happy in his new home. The home study was approved on June 10, 2008. The permanent plan hearing under section 366.26 was set for August 14, 2008.

On July 28, 2008, Ryan B. filed a section 388 petition requesting reunification services with D.H. Ryan B. identified the following changed circumstances: "Ryan B[.] is no longer in jail. While in jail, he completed a class called Fatherhood Focus designed to increase parenting competence, parental responsibility and employability. This class was completed on June 4, 2008, before the [section 366].26 [hearing] was set. He also completed a comprehensive, 3 day training in anger management and conflict resolution in April 2008. Father demonstrates an ability to reunify with his son." He alleged that it would be in D.H.'s best interests to be raised by a parent; asserted that he now understood that his past actions were harmful to his son; informed the court that he was no longer living with or maintaining a relationship with C.H.; and added that he had enrolled in a drug treatment program.

The juvenile court set a hearing on Ryan B.'s section 388 petition for September 2, 2008. On August 15, 2008, Ryan B.'s urinalysis test came back with results indicating a "considerably high level" of amphetamines, and his drug program reported that after several attempts to keep Ryan B. engaged in the recovery process, the decision was made to discharge him from the program. On September 2, 2008, the juvenile court denied the section 388 petition because there was neither a change in circumstances nor would D.H.'s best interest be served by the proposed change in order.

The court held a contested hearing under section 366.26 on September 4 and 5, 2008. C.H. testified that she visited with D.H. for three and one-half to four hours weekly. She characterized the visits as "good," and explained that when they were together, she fed him, played with him, shopped with him,[2] did whatever he wanted to do, and that they would hang out. C.H. testified that D.H. was happy when visits began, that he seemed sad when visits ended, and that she believed that she had a strong bond with her son. C.H. expressed her belief that it would be in D.H.'s best interest to continue visits with her because she was "his mommy." After C.H.'s testimony, the juvenile court concluded, "I cannot find that mother meets the requirements for the [section] 366.26(c)(1)(B)([i]) exception. Despite having regular visits, her relationship with D[.H.] does not meet the requirements set forth in case law and I cannot find that the benefits that D[.H] would receive from my not terminating parental rights would outweigh the benefits that he would receive from being adopted."

The court terminated C.H. and Ryan B.'s parental rights and freed D.H. for adoption. Both parents appeal.

[2] Many of the visits took place in a shopping mall.

DISCUSSION

I. Father's Section 388 Petition

Ryan B. argues that the section 388 petition should have been granted because the original denial of reunification services was erroneous.[3] He contends that it is clear that the juvenile court would have granted reunification services at the time of the adjudication and disposition if the court had understood that his incarceration would be so brief, which appears likely to be true. Ryan B. then argues that if the court had originally granted reunification services, "the likelihood of his 'alleged failure' upon his release would have been greatly lessened," because funding would have been made available for drug treatment. He blames his positive drug test on the court's order denying reunification services, claiming that his dirty test was "as much the result of the court's initial refusal to grant him reunification services when it should have done so as it is any failure on appellant's part to put 23 years of substance abuse behind him in a matter of a few weeks." Ryan B. reasons that because the initial order denying services was erroneous, the denial of the section 388 petition was also erroneous, and concludes that both the section 388 ruling and the subsequent termination of parental rights must be set aside.

This argument disregards the legal standard for a section 388 petition. Section 388 is a general provision permitting the court, "upon grounds of change of circumstance or new evidence . . . to change, modify, or set aside any order of court previously made or to

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[3] Respondents observe that Ryan B. is precluded from challenging the original ruling denying reunification services, made concurrently with the order setting the section 366.26 hearing, because he was advised of the requirement that the referral order must be challenged by means of writ review and then failed to seek writ relief. (§ 366.26, subd. (*l*); *In re Rashad B.* (1999) 76 Cal.App.4th 442, 447; *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 156.) Although Ryan B.'s premise is clearly that the original order was wrong, he does not purport to appeal the original order; he merely argues that he is less culpable for his conduct because he should have been afforded services earlier.

terminate the jurisdiction of the court." (§ 388, subd. (a).) The statute permits the modification of a prior order only when the petitioner establishes by a preponderance of the evidence that (1) changed circumstances or new evidence exists; and (2) the proposed change would promote the best interests of the child. (*In re Zachary G*. (1999) 77 Cal.App.4th 799, 806.) A parent seeking an order for reunification services after they have been denied has the burden of proving by a preponderance of the evidence that the benefit to the child of resuming reunification efforts outweighs the benefit the child would derive from the stability of the permanent placement. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464-465.) We review the court's ruling for an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

We cannot find any abuse of discretion here. There is no question that Ryan B. made a promising start by obtaining those services that were available to him in prison, enrolling in an outpatient drug treatment program and other programs upon his release from prison, and visiting regularly with his son upon his release. These factors caused the trial court to be willing to revisit the question of whether reunification services would be ordered. But by the time of the hearing on the section 388 petition, Ryan B. had been thrown out of his drug treatment program and had demonstrated "considerably high" levels of amphetamine in his urine testing. Whether or not the progress Ryan B. had made could be considered a change in circumstances, the trial court was well within its discretion when it determined that in light of Ryan B.'s failure to stay on course for even a few months in dealing with his long-term substance abuse problem, it would not be in the best interest of two-year-old D.H. to delay his likely adoption with the family that had adopted his half-siblings while Ryan B. was given time to see if he could make meaningful progress. Even when a parent's circumstances appear to be changing, it is not in the child's best interests to delay permanency and stability to see if the parent can overcome his problems at some future point. (*In re Mary G*. (2007) 151 Cal.App.4th 184, 205-206; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

II. Termination of Parental Rights

At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) In order for the juvenile court to implement adoption as the permanent plan, it must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that a relative guardianship should be considered (§ 366.26, subd. (c)(1)(A) or that termination of parental rights would be detrimental to the child under one of six statutorily-specified exceptions (§ 366.26, subd. (c)(1)(B)(i)-(vi)), the juvenile court "shall terminate parental rights." (§ 366.26, subd. (c)(1).) Here, the juvenile court found D.H. to be adoptable, and finding no reason that the termination of parental rights would be detrimental to him, terminated the parental rights of C.H. and Ryan B.

C.H. contests the sufficiency of the evidence to support the juvenile court's ruling that the exception contained in section 366.26, subdivision (c)(1)(B)(i) has not been satisfied here, and Ryan B. joins in her argument. Most courts review a trial court's determination that the section 366.26, subdivision (c)(1)(B)(i) exception does not apply for substantial evidence (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [considering former § 366.26, subd. (c)(1)(A)]), although at least one court has concluded that it is properly reviewed for an abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [considering former § 366.26, subd. (c)(1)(A)].) We need not resolve this difference of opinion here, for under either standard we would uphold the termination of parental rights. Analyzing the court's ruling under the more exacting standard, we affirm the order because it is supported by substantial evidence.

At the time of termination of parental rights the relationship between C.H. and D.H. appears to have been good, but the evidence did not establish the kind of parental

relationship that section 366.26, subdivision (c)(1)(B)(i) was designed to preserve.[4] To establish the parental relationship exception, "the parents must do more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy 'a parental role' in the child's life. [Citation.]" (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.) A beneficial relationship within the 366.26, subdivision(c)(1)(B)(i) exception is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

C.H. did not demonstrate that her relationship with D.H. rose to this parental level. She showed that her monitored visits were consistent and regular. She fed D.H. during visits. They played together, shopped, and did what D.H. wanted to do. He was happy to see her and appeared to be somewhat sad when visits ended. This testimony evinces regular visitation and a positive relationship between C.H. and his mother, but it does not demonstrate that their relationship reached the level at which the parental relationship exception would apply. The evidence of C.H. and D.H.'s relationship failed to establish that the parental relationship promoted D.H.'s well-being to the point that it would outweigh the well-being D.H. would gain by being adopted by his great-aunt and great-uncle, the prospective adoptive parents. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

In no way was the evidence here similar to that in *In re S.B.* (2008) 164 Cal.App.4th 289, 300-301, where the court found that the father demonstrated constant devotion to his daughter as demonstrated by his full compliance with the case plan and continued efforts to regain his health, and where the evidence showed that the child loved

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[4] Section 366.26, subdivision (c)(1)(B)(i) provides that the court shall terminate parental rights unless it finds a compelling reason for determining that termination of rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

her father, wanted their relationship to continue, and received benefit from his visits such that the court believed that "the only reasonable inference" was that she would "be greatly harmed by the loss of her significant, positive relationship" with her father. No such inference was reasonable here based on C.H.'s evidence of what amounted to regular affectionate companionship. Accordingly, substantial evidence supported the trial court's finding that the section 366.26, subdivision (c)(1)(B)(i) exception did not apply.

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.